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Supreme Court of the United States

October Term, 1965

No. 258

ROBERT D. SPIEGLE and DORIS LORRAINE SPIEGLE, his wife,

Petitioners,

against

BOROUGH OF BEACH HAVEN, in the County of Ocean, a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

A

Stated in Petitioners' Petition

B

Stated in Petitioners' Petition

C

Stated in Petitioners' Petition

D

Stated in Petitioners' Petition

E

Statement of the Case

This case involves a consolidation of two suits between the same parties wherein the Petitioners sought to have five ordinances of the Respondent Borough declared unconstitutional and void. The text of these ordinances appears in full on pages three through fourteen of Petitioners' brief. Petitioners also sought the sum of $300 as damages for the removal of certain piling by the Respondent.

The trial court upheld the validity of the ordinances in question as a valid exercise of Respondent's police power, emphasizing the importance in a seashore community of actions designed to preserve and protect the beach front. The sum of $300 was awarded to Petitioners.

The Petitioners' appeals were consolidated and heard by the Supreme Court of New Jersey upon its own motion. The opinion is reprinted in its entirety at pages 1a through 17a of Petitioners' brief wherein the Court unanimously affirmed the decision of the Superior Court of New Jersey.

The Borough of Beach Haven, Respondent in this action, is located on a long, narrow island bounded on the east by the Atlantic Ocean and on the west by the waters of Little Egg Harbor Bay. Throughout its entire history this municipality, like many seashore communities, has been forced to wage a continuous war against the inroads of the sea.

On March 6, 1962, a severe and devastating storm struck this island causing extensive loss of property and life. Many inhabitants were evacuated as the ocean seas swept across the island and rushed into the bay. For many months following the storm, the efforts of the municipal officials were devoted to the immediate problems caused by this disaster. The near total destruction of the beaches

and sand dunes, the only barriers against the sea, left all the communities on Long Beach Island vulnerable to the whim of the Atlantic Ocean. In order to preserve and protect those remaining barriers and to promote the rebuilding of the dunes by natural means, the Respondent enacted the ordinances in question.

On July 31, 1962, the Borough of Beach Haven adopted Ordinance No. 62-10 entitled "An Ordinance Restricting Fences and Other Structures on Private Beaches in the Borough of Beach Haven and Providing Penalties for Violation Thereof." This enactment was amended by Ordinance No. 62-14 on October 23, 1962. The Comprehensive Beach Protection Ordinance No. 63-4 was adopted April 23, 1963, and amended on May 28, 1963, by Ordinance No. 63-5. On October 17, 1964, Ordinance No. 63-4 was further amended by Ordinance No. 64-17.

The Petitioners claim ownership to several lots as shown on "Plan of Subdivision of Beach Haven, Island of Long Beach, Ocean County, New Jersey, Beach Haven Heights Company." They also claim certain property rights eastwardly of their lot lines as shown on this map, together with rights in several streets adjoining their premises.

The Respondent acknowledges the Petitioners ownership of the lots as described in the Petition with reference to the lot and block numbers as the same appear on the above map. Any further allegations of Petitioners with respect to title by accretion or their rights to use Kentford, Leeward, Merivale, Nelson, and Beach Avenues to the exclusion of all others are denied.

F

Not applicable to this brief

G

Argument

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor . . ." Rule 19, 28 U. S. C. A. One such special reason is where a state court has decided a federal question of substance not theretofore determined by this Honorable Court, or has decided it in a way probably not in accord with applicable decisions of this Court. Rule 19(1)(a) 28 U. S. C. A.

The case at bar certainly does not present a substantial federal question never before passed upon. The problem of how far a governmental agency may restrict the use of an individual's lands without breaking the constitutional mandates against taking without compensation has been the subject of innumerable decisions. No rigid rules can be laid down to distinguish compensable losses from non-compensable losses. Each case must be judged on its own facts. *United States* v. *Caltex, Inc.*, 334 U. S. 149, 97 L. ed. 157 (1952).

Petitioners cannot be heard to say that a New Jersey municipality lacks authority to regulate its beach front under its police powers. N. J. R. S. 40:48-1 specifically empowers a municipality to make and enforce ordinances to:

> "Fix and determine the lines of bulkheads or other works or structures to be erected, constructed or maintained by the owners of lands facing upon any navigable water in front of their lands . . . and to designate the materials to be used, and the type, height and dimensions thereof."

Various other statutes have been enacted by our legislature relating to the protection of the beach front and police power in general. N. J. R. S. 40:92-9 provides:

> "The governing body of any borough may protect its ocean or beach front from encroachment by the

sea by the construction, erection, building, rebuilding, maintenance and repair of bulkheads, jetties and other works and structures for the protection thereof along the Atlantic Ocean. Such improvements or works may include the filling in and grading of land around and about any bulkhead, work or other structure to such grade as may be established by the borough, necessary to maintain and preserve the same. Such improvements, repairs and structures may be made and erected both above and below high water line."

N. J. R. S. 40:56-1 states in part:

"Any municipality may undertake any of the following works as a local improvement; and the governing body thereof may make, amend, repeal and enforce ordinances for carrying into effect all powers granted in this section:

(h) The improvement or reimprovement of any beach or water front, and the providing of suitable protection to prevent damage to lands or property by the ocean or other waters, including the filling in and grading necessary for the protection of such improvements."

N. J. R. S. 40:48-2 contains an additional grant of power. It provides:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law."

Nor must the municipality wait until the eleventh hour before acting to safeguard the welfare of the community. In *City of Newark* v. *Charles Realty Co.*, 17 N. J. Super 351 (Cty. Ct. 1952) an ordinance requiring adequate

heating facilities to protect plumbing fixtures from freezing was under attack. In answer to Plaintiff's contention that the Defendant was without power to act in advance Judge Francis said:

> "The contention that the city may not exercise its police power until harm has befallen lacks legal soundness. The major exercise of that power has always been in the field of prevention, to avert the occurrence of conditions that might put the well-being of the community to hazard. There is no appeal in the proposition that in a climate where freezing temperatures are frequently encountered, the city must stand by, helpless and without power to avoid the insanitary conditions that will certainly follow the freezing of unprotected water closets."

Apt expression of the power of a municipality to ward off the occurrence of dangerous conditions is found in the case of *Fenton* v. *Atlantic City,* 90 N. J. L. 403 (Sup. Ct. 1917) where the Court stated at page 406:

> ". . . it is a proper exercise of police power in the interest of public health, as well as its duty, to prevent a condition likely to be detrimental as much as it is to abate such condition after its evil consequences appear . . ."

Numerous cases need not be cited to establish the general principle of law applicable to this issue. Private property may not be "taken" for public use without just compensation. The difficulty lies not in stating the principle of law but in applying the same to the ordinances under attack. As Justice Heher pointed out in *Grosso* v. *Board of Adjustment of Millburn,* 137 N. J. L. 630 (S. Ct. 1948) whether the particular enactment constitutes a taking is a question of degree and therefore cannot be disposed of by general propositions.

Before approaching the case sub judice a firm and clear understanding of the concept of "police power" is essen-

tial. The term is not one of clearly ascertained legal principle, but a term of convenience, historically originating and expanding to describe legitimate local power. It is not something which is rigid and definitely fixed, on the contrary, in its very nature it must be considerably elastic to meet the changing and shifting conditions of our society.

The lawful exercise of the police power necessarily interferes in some respects with the liberty of the citizen such as in his right to use his property. This interference is justified on the ground and only to the extent that it is required in order to protect the personal and property rights of others and advance the best interests of society. A distinguishing characteristic of the police power is that it is a reasonable preference of public over private interests. *Miller* v. *Schoene,* 276 U. S. 272, 72 L. Ed. 568 (1928). The Court therein stated, "... and where the public interest is involved, preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."

Thus, the question in essence reduces itself to one of fact, to wit; whether the impact of the regulations imposed by the ordinances in question as applied to Petitioners deprives them of the beneficial use of their lands. In this regard, the burden of proof lies upon Petitioners to show that the [redacted] constituted an unreasonable exercise of the P[redacted]ice power. *Goldblatt* v. *Hempstead,* 369 U. S. [redacted] 2d 130 (1962). The Supreme Court of New Jersey unanimously determined that Petitioners failed to adduce proof of some present or potential beneficial use of which they have been deprived.

The case of *Goldblatt* v. *Hempstead, supra,* included a review of a town ordinance prohibiting excavations below two feet above maximum ground level. The property owners contended that the ordinance in question took their property without due process of law in violation of the

Fourteenth Amendment. Mr. Justice Clark delivered the opinion of the Court. He stated in part that:

> "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."
>
> Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature . . .' E.g., Sproles v. Binford, 286 U. S. 374, 388, 76 L. ed. 1167, 1179, 52 S. Ct. 581 (1932).
>
> The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.

Upon reviewing the record, this Honorable Court concluded that the evidence produced failed to meet the burden of proof necessary to determine that the ordinance constituted an unreasonable exercise of the town's police powers.

With the foregoing authorities in mind, the Court's attention is invited to the specific ordinances in question.

A. Ordinance 62-10 as amended by Ordinance 62-14. These two ordinances, in short, prohibit the erection of fences, walls, posts, piling, stakes or structures which will interfere with the performance of beach protection work by public officials or employees without first obtaining a permit from the Board of Commissioners of Respondent

Borough. They do not, as Petitioners contend, "compel the plaintiffs to allow the public to use the land which they owned." Such a contention is no more than a blatant effort to read into these ordinances language which does not appear therein. Having done this Petitioners then cite numerous cases involving completely different factual situations and proceed to argue that these cases indicate Ordinances 62-10 and 62-14 take their property and give it to others. Petitioners even go farther and state unequivocally that these ordinances compel them to share the possession, use and enjoyment of their property with the public and with representatives of the Respondent.

These ordinances neither expressly nor impliedly purport to legislate with respect to any other subject matter than that set forth in their Titles, i.e., to restrict fences and other structures on private beaches. They do not give the public free use of Petitioners' beaches. They do not even absolutely prohibit the erection of fences and the like. All that is required is for one to obtain a permit prior to construction. Is this such an unreasonable request? If random construction of fences and structures were permitted, municipal vehicles and other equipment would be completely disabled in times of emergency. By requiring a permit the Respondent will have advance notice of the location, size and extent of fencing, etc., and may plan its emergency operations accordingly.

It is submitted that Ordinance 62-10 as amended by Ordinance 62-14 constitutes a legitimate and valid exercise of the Respondent's police power pursuant to N. J. R. S. 40:48-2.

B. Ordinance 63-4 as amended by Ordinance 63-5 and Ordinance 64-17. Ordinance 63-4 was enacted in accordance with the findings and declarations as set forth in section 2 thereof. It is an attempt to preserve the Respondent's only means of survival against the ravages of nature by regulating certain conduct within defined areas on the oceanfront. The destructive fury of the March 1962 storm

threatened the very existence of the communities on Long Beach Island. The functions of sand dunes changed from one of aesthetic beauty affording recreation for children and adults alike to one of survival. Sand became as valuable an element as the precious metals.

In order to accomplish the foregoing, these ordinances in short establish a building line and a bulkhead line. They also regulate the type of construction permitted eastwardly of the Building line and prohibit certain activity such as sand removal and indiscriminate crossing of the dunes.

As previously indicated, N. J. R. S. 40:48-1 specifically authorizes a municipality to fix and determine bulkhead and building lines on beach fronts. The necessity for such legislation is supported by the Borough engineers' uncontradicted testimony as to dangers of constructing homes east of the building line as established by Ordinance 64-17. Such a house, if destroyed in a storm, would carry away and endanger other properties; sewer and water lines would break, gas mains would be destroyed and roads washed away.

Petitioners contend that this ordinance deprives them of their right to construct whatever they might want to construct in this area. Is this any different from the common setback or building lines found in practically every well-planned community? The establishment of reasonable setback lines constitutes a proper exercise of the police power, since they tend to preserve the public health, add to the safety from fire and enhance the public welfare by bettering living conditions. There is no physical taking of property in a legal sense in the imposing of such lines, although the owner is deprived of part of his land for the purpose of building. *Bissell* v. *Town of Bethel,* 113 Conn. 323, 155 Atl. 232; 7 McQuillin 24.541 at pages 527 and 528. Furthermore, municipal building codes and ordinances generally must relate to the future, excepting provisions relat-

ing to repairs, reconstruction and alterations. 7 McQuillin 24, 512.

It is unfortunate that the beach in front of the Petitioners' property has eroded to its present position. But this is a risk any purchaser of water-front property assumes. His land may be reduced in area due to encroachments of the sea where it is no longer safe to build on as in the case at bar.

Paragraphs A, B, and C of Section 4 of Ordinance 63-4 set forth permitted construction applicable to the beach-dune area as defined in Section 3 thereof and in Section 1, Paragraph B of Ordinance 64-17.

Protective works, boardwalks, steps, sand fences, pavilions or similar platforms and bulkheads are permitted providing the same conform to the standard specified therein.

Paragraph D of Section 4 merely provides for access to the open beach. It does not prohibit access nor does it terminate an individual's right to use and enjoy the open beach.

Paragraph E concerns itself with the critical dune area. This sub section is intended to prevent persons from climbing upon and crossing the dunes except on existing walkways or for the purpose of protecting the same. Engineer William Taylor's testimony at the trial established beyond question the harmful effect of continued trespass upon sand dunes.

Only a word need be said with respect to the rules of construction relating to Ordinances in general. Ordinances should be reasonably and liberally construed in order to give to them the effect intended. *City Affairs Committee of Jersey City* v. *Board of Commissioners of Jersey City*, 132 N. J. L. 180, aff. 134 N. J. L. 552 (E. & A. 1946). The pre-

sumption of reasonableness, validity and constitutionality of legislation is fully applicable to measures enacted under the police power and courts indulge in not only every legal presumption but every reasonable inference of fact in favor of the validity of police legislation. The burden is always upon the one who denies the validity or constitutionality thereof. 6 McQuillin, sec. 24.31. Where there are two possible interpretations of a statute or ordinance, by one of which the law would be unconstitutional, and by the other it would be valid, a court should adopt the construction which will uphold the law. *Adams Newark Theatre Co.* v. *City of Newark*, 22 N. J. 472 (1956), aff. 354 U. S. 931.

Petitioners further contend that Respondent's ordinances do not contain sufficiently definite standards so as to meet constitutional requirements. In an effort to sustain their position, Petitioners have repeated the various definitions set forth in Section 3 of Ordinance 63-4 in such a manner so as to create the impression of total confusion and mass contradiction.

Attention is called to Ordinance 64-17 which amends Ordinance 63-4. This ordinance adopts a Bulkhead and Building Line as shown on a map prepared by the Respondent's Engineer and which is on file in the Office of the Borough Clerk. All anyone need do is but glance at this map in order to determine the effect of these ordinances upon his property. No one is required to speculate at the peril of life, liberty, or property. The exact and precise location of the beach-dune area is readily ascertainable. It constitutes all that area lying eastwardly of the Building Line as shown on the above map.

The fact that the language used leaves some determination to be made by the official who is to administer the ordinance does not render the ordinance void. In *State* v. *New York Central Railroad Co.*, 37 N. J. Super. 42 (App. Div. 1955) a penal ordinance of the Borough of Dumont,

proscribed "loud and unnecessary noise which, disturbs the public peace." The elasticity of the word 'unnecessary' was similarly made a point of attack as are the words "adequately" and "satisfaction of the borough engineer" in this ordinance. The ordinance was ultimately upheld. Judge Conford discussed the use of general language in ordinances, concluding that:

> "Where the legislative regulatory object is appropriate and the conduct intended to be prohibited is not fairly susceptible of definition in other than general language, there is no constitutional impediment to its use. State v. New York Central Railroad Co., supra."

The case of *Kovacs* v. *Cooper*, 336 U. S. 77, 93 L. ed. 513, reh. den. 336 U. S. 921, 93 L. ed. 1083 (1949) involved an appeal from a judgment of the Court of Errors and Appeals of the State of New Jersey affirming a conviction of violating an ordinance prohibiting the operation upon the city streets of vehicles equipped with sound amplifiers which emit loud and raucous noises.

The defendant contended that the ordinance was vague, obscure, and indefinite as to be unenforceable. The objection centered around the use of the words "loud and raucous." Mr. Justice Reed in speaking for this Honorable Court stated that while these words are abstract words, they have through daily use acquired a content that conveys to any interested person . . . a sufficiently accurate concept of what is forbidden.

As demonstrated above, the Beach Protection Ordinances are a valid exercise of the police power enacted for the general health, safety and welfare of the community. The definitions of "dune line" and "beach", etc., must necessarily be in general language for the very nature of sand dunes connotes a shifting and unstable mass of sand, subject to the whim of the sea and wind. The enunciation of a plan to protect and project the useful existence of this

sometimes "natural" barrier, a plan to insure that it will always be a barrier, must be general.

The precision of a mathematical formula in promulgating standards is not a constitutional mandate.

H

Conclusion

The petition for a writ of certiorari should be denied for the following reasons:

1. No substantial federal question is involved.

2. The case below in essence turned on a question of fact decided adversely to the Petitioners, to wit; whether the ordinances in question deprived Petitioners of the beneficial use of their land.

3. The case involves questions which must be decided upon the facts of each case.

4. Petitioners were afforded an opportunity to avail themselves of further proceedings based upon a claim and showing of an actual taking of a beneficial use.

Respectfully submitted,

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